BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 03-191
	)	
COMMUNITY LANDFILL COMPANY, INC., an Illinois Corporation, and CITY OF MORRIS, an Illinois Municipal Corporation,,	)	
	)	
Respondents.	)	

NOTICE OF FILING

TO: All counsel of Record (see attached Service List)

Please take notice that on October 13, 2009, the undersigned electronically filed the

CITY OF MORRIS' MOTION TO STAY PENDING APPEAL

with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601.

Dated: October 13, 2009

Respectfully submitted,

On behalf of the CITY OF MORRIS

/s/ Charles F. Helsten
One of Its Attorneys

Charles F. Helsten
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900

BEFORE THE POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, Plaintiff, v. COMMUNITY LANDFILL CO., an Illinois Corporation, and the CITY OF MORRIS, an Illinois Municipal Corporation,, Defendants.	)	PCB 03-191 (Enforcement – Land)

CITY OF MORRIS' MOTION TO STAY PENDING APPEAL

NOW COMES the City of Morris, by and through its attorneys, and pursuant to Illinois Supreme Court Rule 335 and Section 101.906(c) of the General Rules of the Illinois Pollution Control Board ("PCB" or "the Board") moves the Board for a stay pending appeal for the following reasons.

1. Section 101.906(c) of the PCB General Rules provides that stays pending appeal are governed by Illinois Supreme Court Rule 335. Rule 335(g) states that a stay pending appeal shall ordinarily be sought in the first instance from the administrative agency.

2. The Illinois Supreme Court has addressed factors that should be considered in ruling on a motion for stay pending appeal. *Stacke v. Bates*, 138 Ill.2d 295, 304-05, 562 N.E.2d 192, 196 (1990). One consideration is "whether a stay is necessary to secure the fruits of the appeal in the event that the movant is successful." *Stacke*, 138 Ill.2d at 305, 562 N.E.2d at 196. Other equitable factors should be balanced, and include whether the *status quo* should be preserved, the

respective rights of the litigants, and whether hardship on other parties would be imposed. *Stacke*, 138 Ill.2d at 305-06, 309, 562 N.E.2d at 196, 198. Another consideration is whether there is a "substantial case on the merits" (not likelihood of success on the merits), but this "should not be the sole factor." *Stacke*, 138 Ill.2d at 309, 562 N.E.2d at 198. Here, all factors favor a stay.

3. Here, a stay is "necessary to secure the fruits of the appeal in the event that the movant is successful" and to preserve the status quo.

4. The PCB has ordered this small municipality to pay $399,308.98 as a penalty, plus post financial assurance in the amount of $17,427,366, as a joint and several obligation of the co-defendant, Community Landfill Company, Inc. (CLC). If the City is forced to immediately assume full responsibility for more than $17 million dollars in financial assurance, its ability to obtain short-term financing would be eviscerated, as its bonding/borrowing authority would be utterly depleted. This would cripple the City's capacity to respond to exigent circumstances or municipal emergencies.

5. Requiring the City to post financial assurance would deprive the City of the fruits of its appeal. This is an "all or nothing" proposition. If the City is required to perform during the pendency of the appeal and post financial assurance, the City will have to pay a significant bond premium, as it cannot post a government guaranty for the full amount. If the City is ultimately found to not be liable, from whom is the City going to be able to recoup the expenses? Yet, there can be no question that the City is going nowhere, and it has ultimately the

ability to generate funds by levying taxes – although this would take time. The City lacks the current funds to comply with the order (Mo/Reconsider exs. A, D). While there are over 20 types of municipal funds, the City is limited as to the use of those funds (Mo/Reconsider ex. A). There are already contractual commitments for some funds, and for other funds (such as retirement and pension funds) the monies cannot be used for another purpose (*id.*). Monies from most funds cannot be transferred from fund to fund (*id.*). The City's ability to generate funds is limited by state law. For example, if the City were to increase real property taxes, the revenues would not be realized for about a year (Mo/Reconsider ex.A, D). If, at the conclusion of the appeal, the appellate court finds that the City is required to satisfy financial obligations relating to closure – in addition to its performance of leachate treatment – the City will have the ability to generate funds via the imposition of taxes, in addition to considering other potential avenues for raising revenue.

6. If the City pays the penalty now, there is no easy process for the return of the funds if the City prevails on appeal, and the State, currently in dire need of liquid funds, could spend the monies. While a court could order the State to return the funds, this could require a legislative appropriation or other complicated process. A stay should be entered in order to maintain the status quo. If the penalty is paid, then under the Act, those monies go to a special fund, the Environmental Protection Trust Fund. 415 ILCS 5/42(a); 30 ILCS 105/125.1. The disbursement of this fund is controlled by a commission of four persons,

including the Attorney General, the Director of Natural Resources, the PCB Chairman, and the Director of the Environmental Protection Agency. 30 ILCS 105/125.1. These four persons have the right to approve grants and administer the funds on behalf of the State. *Id.* If this fund is inactive for 18 months or if discontinued by legislative action, the monies are transferred to the General Revenue Fund. 30 ILCS 105/5.102. The Illinois Legislature also may order the transfer of monies from the Environmental Protection Trust Fund into the General Revenue Fund. For example, starting July 1, 2006, the Legislature ordered that $2,228,031 be transferred to the General Revenue Fund. 30 ILCS 105/8.44. Put a different way, there is no simple way to recover money from the State.

7. Two of the other factors, what hardship would be imposed on the State and the weighing of the respective rights of the litigants, also weigh in favor of a stay. The City's population at the last census (2000) was less than 12,000, and of those individuals, only 8,620 citizens were 20 years or older, or potential taxpayers. http://city.mornet.org/html/population_age.htm. The order imposing this multi-million dollar financial assurance has the potential to crush this tiny municipality. Although the Board noted concern about ***millions*** of State taxpayers, it overlooked the fact that its order seeks to hold a few thousand municipal taxpayers responsible to pay the price for the landfill company that operated the facility and now claims it is insolvent, and for

Frontier Insurance, a bonding company now in receivership. The impact on the City's taxpayers would be devastating.

8. Weighing the equities also favors a stay. There is no harm to the State if a stay is entered. This municipality is not going to disappear and, as noted above, if it does not prevail on appeal, then steps can be taken to post financial assurance. Indeed, the statute itself contemplates that government entities are not similarly situated to private companies. It is unquestioned that government entities may post a government guarantee under the regulatory requirements (9/12/07 Tr. 36). 35 Ill.Adm.Code §811.716. As of July 2009, the City's independent auditor estimated that the City would qualify to guarantee between $8.5 to 8.75 million (Mo/Reconsider ex. D).[1]

9. That the City is in a different position than a private individual or company for purposes of stays pending appeal is recognized by Illinois Supreme Court Rule 305, which governs stays in the appellate court, and, in part, provides:

> **(i) Appeals by Public Agencies.** If an appeal is prosecuted by a public, municipal, governmental or quasi-municipal corporation, . . . the circuit court, or the reviewing court, or a judge thereof, may stay the judgment pending appeal without requiring that any bond or other form or security be given.

10. The equities also favor the City because it has complied with parts of the Board's order even though the order was automatically stayed under PCB

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[1] The Audit will be complete and presented for approval on October 19, 2009.

§101.520(c). As the City said it would in its Motion to Reconsider, Shaw Environmental has provided updated cost estimates to the IEPA (which initially rejected them because CLC had yet to sign and verify them) (*see* attached ex. 1, EPA letter). The equities also favor the City because well before the Board entered any order, the City initiated routine testing and monitoring of site conditions (Mo/Reconsider ex. C).

11. Additionally, a stay is also warranted by the fact that the purpose of financial assurance is "for closure and post-closure care of the site." 35 Ill.Adm.Code §811.700(c). Here, closure is not imminent. Indeed, this Board expressly declined to order the closure of Parcel B (9/18/09 Order p. 3). The purpose of financial assurance is to provide a financial vehicle in the event that there is a future need for finances when the landfill is closed, and during post-closure care. This requirement is not to provide finances for a present need. Because the purpose of financial assurance is to provide a vehicle for funding based on a contingent future need, there is no harm in staying the requirement to post financial assurance, pending outcome of the appeal.

12. The final factor is whether there is a substantial case on the merits. *Stacke*, 138 Ill.2d at 309, 562 N.E.2d at 198. This is not the same as likelihood of success on the merits, and is only one consideration, not the "sole factor." *Id.* This Board is familiar with the City's position through its post-hearing briefs and briefs submitted in support of its Motion to Reconsider, adopted and incorporated herein by reference. While this Board did not agree with the City's

position, it cannot be said that there is not a substantial case on the merits. For example, this Board found that there was no evidence of the amount that the City benefited by not posting financial assurance, so it assessed as a penalty the amount the City received as "dumping royalties or tipping fees from the Landfill operations in the years 2001-2005" (6/18/09 Order at 41). Yet, §42(b)(3) of the Act provides that an appropriate penalty is to be determined based on "any economic benefits accrued by the respondent ***because of delay in compliance with requirements,*** in which case the economic benefits shall be determined by the lower cost alternative for achieving compliance." 415 ILCS 5/42(h)(3)[2] (emphasis added). The statute thus contemplates that the amount of the penalty should be determined by assessing the benefit that was gained by non-compliance, not just any alleged benefit related to the landfill. The State simply failed to meet its burden to show the amount the City allegedly benefitted, and there is a "substantial case on the merits" on the penalty issue for this issue alone, as well as others.

13. Another example demonstrating a substantial case on the merits is the Board's order requiring the posting of financial assurance. As outlined in the

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[2] This Board recently properly applied the economic benefit test after finding that Edward Pruim and Robert Pruim were the true operators of the CLC landfill. *People v. CLC and Pruim, et al.*, Cons. Nos. 97-193, 04-207, Aug. 20, 2009 Order, pp. 55-56. There, however, the State apparently submitted evidence regarding the Pruims' savings by not filing financial assurance. *Id.*, State's Closing Argument and Post-Hearing brief p.49. Here, no such evidence was presented.

post-hearing briefs, and, more recently, the Memorandum in Support of the Motion for Reconsideration (incorporated by reference herein), this Board's finding that the City, which only owns the property, is the "operator" is against the manifest weight of the evidence, and some of its findings have no support in the record.

14. In addition, the State has made inconsistent claims with regard to who is the operator of the landfill. In this case, it claimed that the City is an "operator" of the Landfill. However, in another case, it claimed that CLC and the sole shareholders and owners of CLC, Edward and Robert Pruim, were in fact the operators of CLC, that the Pruims had the sole authority whether to continue or "shut down operations," that "only the Pruims had the authority to arrange for financial assurance," that "Edward and Robert Pruim were the only persons who could have arranged for the appropriate amount of financial assurance at the Landfill," and that the Pruims decided "whether and when to comply with the pertinent landfill regulations." *People v. CLC and Pruim, et al..*, Cons. Nos. 97-193, 04-207, Feb. 6, 2009 State's Closing Argument and Post-Hearing Brief, pp. 9, 19, 20-26, 29-30, 32, 40. The State's position in *People v. CLC and Pruim* was that the City was merely the owner, not the operator. *Id.* pp. 9, 28, 40. The State's inconsistent assertions as to who controlled and operated the Landfill raise substantial questions about the merits of this case.

15. Moreover, the Board found, in its Final Order in *People v. CLC and Pruim, et al.*, PCB 97-193 (August 20, 2009) that "[t]he evidence in the record

demonstrates that the Pruims were solely responsible for permits" for the Landfill (*id.* at 42)(emphasis added). The Board's Order includes its observation that the State was adamant that "[t]he Pruims personally caused the financial assurance violations and as sole owners the decision not to expend resources ultimately benefitted the Pruims" (*id.* at 44). The Board's Order further found that "only the Pruims could decide to stop accepting waste at the landfill" (*id.* at 48)(emphasis added) and that "[h]aving found that the Pruims were solely responsible for permitting and that the Pruims were liable for failure to secure financial assurance, the Board finds that the Pruims are also liable for the failure to revise cost estimates biennially" (*id.* at 49).

16. Given the facts of the State's case against the City, given the Board's prior findings that it was the Pruims who operated the Landfill and the Pruims who were "liable for the failure to secure financial assurance," and further, given the fact that the City can provide a government guaranty in the approximate amount of $8.5-8.75 million, this Board should enter a stay pending appeal. If this Board believes that an appeal bond is needed, in light of its ultimate holding in the matters noted immediately above, it should require CLC and the Pruims to post the bond and comply with the orders, not the municipality.

17. For all the reasons discussed herein, a stay is necessary in this case. The United States Supreme Court recently explained why stays pending appeal are necessary:

> It takes time to decide a case on appeal. Sometimes a little; sometimes a lot. "No court can make time stand still" while it considers an appeal, *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 9 (1942), and if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review. That is why it "has always been held,...that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." *Id.*, at 9-10 (footnote omitted). A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it.

Nken v. Holder, 129 S.Ct. 1749, 1754, 173 L.Ed.2d 550 (2009) (holding a court's inherent authority to stay pending appeal and the traditional factors apply, not the demanding standards of 8 U.S.C. §1252(f)(2)).

CONCLUSION

For the reasons discussed above, the City of Morris requests that the Board stay its order pending appeal and grant such other relief as the Board deems proper.

/s/ Charles F. Helsten
Attorney for the City of Morris

Charles F. Helsten
Nancy G. Lischer
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
(815) 490-4947

Exhibit List

Exhibit	Description
1	EPA letter dated September 15, 2009

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276 • (217) 782-2829
James R. Thompson Center, 100 West Randolph, Suite 11-300, Chicago, IL 60601 • (312) 814-6026

PAT QUINN, GOVERNOR DOUGLAS P. SCOTT, DIRECTOR

217/524-3300

September 15, 2009

Certified Mail
7002 3150 0000 1111 1018
7002 3150 0000 1111 1025

OWNER
City of Morris
Attn: Mayor Richard Kopczick
320 Wauponsee Street
Morris, Illinois 60450

OPERATOR
Community Landfill Company
Attn: Mr. Robert J. Pruim
1501 S. Ashley Road
Morris, Illinois 60450

Re: 0630600001 -- Grundy County
Community Landfill – Parcel A
Log No. 2009-424
Permit Landfill 810-817 File
Permit DOI

Dear Mayor Kopczick and Mr. Pruim:

Pursuant to 35 IAC 813.103(b), the Illinois Environmental Protection Agency has reviewed, for purposes of completeness only, the application referenced above, dated August 17, 2009 and received August 18, 2009. This review has revealed that the application does not contain the information described below and therefore is incomplete. This determination of incompleteness is based on the omission of the following item(s):

1. The application was not signed by the operator. Pursuant to 35 IAC Section 812.104, all permit applications shall be signed by a duly authorized agent of the operator and property owner.

Within 35 days after the date of mailing of this Illinois EPA final decision, the applicant may petition for a hearing before the Illinois Pollution Control Board to contest the decision of the Illinois EPA, however, the 35-day period for petitioning for a hearing may be extended for a period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Illinois EPA within the 35-day initial appeal period.

If you submit additional information addressing the deficiencies identified within 35 days of the date of this letter, the Illinois EPA shall review it for completeness in conjunction with the information contained in the application deemed incomplete. If additional information is submitted, this new application will be considered to have been filed on the day that the additional information was received by the Illinois EPA. Please be aware that any additional information should:

EXHIBIT
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tabbies

1. be in a format which allows incorporation of the new information into the appropriate sections of the current application;

2. include a cross-reference indicating where in the new information each deficiency, identified above, has been addressed;

3. have the date of the revision on each page and on each drawing;

4. include an original and at least three copies; and

5. be submitted to the address below.

Illinois Environmental Protection Agency
Bureau of Land -- #33
Permit Section
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276

If you do not submit additional information within 35 days, you will need to submit a new permit application in its entirety.

If you have any questions regarding this letter, please contact Christine Roque at 217/524-3299.

Sincerely,

Stephen F. Nightingale, P.E.
Manager, Permit Section
Bureau of Land

CJL
SFN:CMR:bjh\091132s.doc
CMR

cc: Jesse P. Varsho, P.E. – Shaw Environmental, Inc.

AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on October 13, 2009, she caused to be served a copy of the foregoing upon:

Mr. Christopher Grant Assistant Attorney General Environmental Bureau 69 W. Washington St., Suite 1800 Chicago, IL 60602	Mark LaRose LaRose & Bosco, Ltd. 200 N. LaSalle, Suite 2810 Chicago, IL 60601
Mr. John T. Therriault, Assistant Clerk Illinois Pollution Control Board 100 W. Randolph, Suite 11-500 Chicago, IL 60601 **(via electronic filing)**	Bradley Halloran Hearing Officer Illinois Pollution Control Board 100 W. Randolph, Suite 11-500 Chicago, IL 60601
Mr. Scott Belt Scott M. Belt & Associates, P.C. 105 East Main Street Suite 206 Morris, IL 60450	Clarissa Y. Cutler Attorney at Law 155 N. Michigan Ave., Suite 375 Chicago, IL 60601

Via E-Mail and regular U.S. mail.

Joan Lane

HINSHAW & CULBERTSON
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
(815) 490-4900